

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

Miami-Dade County Courthouse
Miami, Florida
Thursday, 9:05 a.m.
May 25, 2000
PHASE II-B

TRIAL - VOLUME 523

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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On behalf of Plaintiffs

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BRADLEY LERMAN, ESQ.

On behalf of Defendant Philip Morris

DECHERT PRICE & RHOADS

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On behalf of Defendant Philip Morris

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On behalf of Defendant R.J. Reynolds

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On behalf of Defendant Brown & Williamson

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On behalf of Defendant Council for Tobacco Research
I N D E X

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1 WITNESS PAGE
2
3 RONALD M. DAVIS, M.D.
4 Direct by Mr. Rosenblatt 51649
5
6 E X H I B I T S
7 PLAINTIFFS' OFFERED ADMITTED FOR ID
8 EXHIBITS PAGE PAGE PAGE
9 None
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11 E X H I B I T S
12 DEFENDANTS' OFFERED ADMITTED FOR ID
13 EXHIBITS PAGE PAGE PAGE
14 None
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1 (Whereupon, the following proceedings were had:)
2 THE COURT: Have a seat, folks.
3 I really don't want this to be a daily
4 occurrence. Let's see. Davis?
5 MR. DODDS: Yes, Your Honor.
6 THE COURT: Okay. What is so urgent?
7 MR. DODDS: Your Honor, may we excuse the
8 witness, please?
9 THE COURT: All right. Is Dr. Davis here?
10 If you'd step out in the hall for a few minutes, I'd
11 appreciate it.
12 (Dr. Davis exited the courtroom.)
13 THE COURT: Go ahead.
14 MR. DODDS: May it please the Court. This is

15 our motion to limit the testimony, not only of
16 Dr. Davis, but also of Dr. Cummings and Dr. Burns. We
17 have tried, pursuant to Your Honor's suggestion, to
18 combine these as best we can. And so I will do my best
19 to address issues we believe will arise, if not every
20 issue, then most of the important cross-cutting issues
21 that will arise as to each one of them. And then I
22 will give particular attention to a few topics relating
23 to Dr. Davis in specific.

24 Rather than take time to enumerate them all
25 at the early going, I'd like to jump right into it.

6

1 The issue, Your Honor, that I'm going to
2 address first and at greatest length relates to class
3 size.

4 Each of these witnesses, Your Honor, has done
5 class size estimates. They're changing all the time,
6 but I should point out, Your Honor, that if Your Honor
7 had not ordered the depositions last week, we, sitting
8 here today, would not even know what their most recent
9 estimates were.

10 So it was fortuitous that the plaintiffs'
11 objections on that score were overruled. None of the
12 estimates are the same; but more importantly, they're
13 not even apples to apples in terms of what they tried
14 to estimate, let alone how they tried to estimate it
15 and how they wind up with regard to their opinions.

16 That confusion is not the grounds for the
17 motion, however. I just mention it because we're going
18 to have a lot of confusion here going forward when they
19 hear inconsistent testimony on the same subject.

20 There are also many major and minor
21 methodological problems I'm not going to raise here.
22 Those are for cross-examination. I'm going to deal
23 rather with two fundamental problems which demonstrate
24 that these class size estimates are not relevant and
25 therefore should not be admitted.

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1 I'm going to summarize them right now, Your
2 Honor. One, they do not attempt to estimate the class
3 that was certified. Two, they do not try to estimate
4 the next key number, which is the number of qualified
5 class members who are going to be entitled to
6 participate in the punitive damages award.

7 THE COURT: Hold on just one second here.
8 Maybe I missed something. I'm going over this motion.
9 Maybe it's because it's called a supplemental memo.

10 MR. DODDS: Let me hand Your Honor an
11 additional copy of the original motion.

12 THE COURT: Let's see if I have that here. I
13 was looking for the argument on the class size and I
14 didn't have it.

15 MR. DODDS: Okay.

16 THE COURT: Well, for some reason I didn't
17 have that one. Maybe that will make a difference.

18 MR. DODDS: Well, let's walk through it, Your
19 Honor, because I think that would be necessary in any
20 event.

21 Needless to say, in estimating the size of
22 the class, the starting point is what is the class, how
23 has it been defined? And obviously there's no dispute
24 about that. The class is defined as all Florida
25 citizens and residents and their survivors who have

1 suffered, presently suffer or who have died from
2 diseases and medical conditions caused by their
3 addiction to cigarettes that contain nicotine.

4 So what is the first thing that we're looking
5 at in the class definition? And, Your Honor, I think
6 it would be helpful to diagram this very briefly with a
7 simple tool, a large circle, all Florida citizens and
8 residents. You have to start there, obviously.

9 And the next question is: How many of them
10 have diseases that the jury in Phase I found were
11 related to smoking?

12 That would be smaller than the circle of all
13 Florida citizens and residents. This is not obviously
14 going to be to scale. So that's all the Florida
15 residents, and this is all those with smoking-related
16 diseases.

17 This circle, Your Honor, up until last week,
18 is as far as any of the three got. They had never
19 gotten further than this in their analysis. They came
20 up with different numbers, got there different ways,
21 but in any event, that's as far as they got.

22 In any event, all of them made a stab at this
23 but didn't get there. Dr. Davis, for example, did not
24 calculate the number of people living with a disease.
25 So under his calculations, neither Mrs. Farnan nor

1 Mr. Amodeo would have been in his class, as he
2 calculated it.

3 Big problem, his estimate is incomplete.

4 Dr. Burns did not include a number of
5 diseases found by the jury to have been smoking
6 related, complications of pregnancy, people with heart
7 disease that had not yet had a heart attack, people
8 with peripheral vascular disease and some others.
9 These are big populations, Your Honor.

10 Dr. Cummings, same problem.

11 So right there, before we even get one step
12 into the analysis, both of them, all three of them,
13 really, are off track. And for those reasons alone,
14 their count is inadmissible. It's not relevant,
15 they're not measuring the right thing.

16 Both Dr. Burns and Dr. Davis, Dr. Davis
17 testifying today, count people who have died of a
18 smoking-related disease but not survivors. That's a
19 different number. Probably smaller. But maybe not.
20 They just haven't done the analysis to know one way or
21 the other.

22 The next level is, okay, we have these
23 people, they're smokers. And I should point out, Your
24 Honor, when we started this case in 1994, both sides
25 assume we're only talking about smokers, not former

1 smokers. Now we're including both, but the definition
2 doesn't really tell you one way or the other.

3 In any event, the next question is: How many
4 of those had their smoking-related disease because they
5 smoked? That is, if you have multiple risk factors for
6 heart disease, how many of those got their heart
7 disease because of their smoking?

8 Well, that requires an individual trial at
9 the end, but you can estimate it and their means for
10 doing so. Up until last week, none of them had. But

11 they did. And so he went to the next level of
12 analysis.

13 And this, Your Honor, it's called
14 attributable risk. That is, what proportion of people
15 with the smoking-related disease, how much of that is
16 attributable to their smoking? They've done that, Your
17 Honor, and that's as far as they go.

18 So right there we know one thing for sure,
19 that the central element or a central element of this
20 definition, the one that got the class certified, has
21 not been taken into account. What is that? Addiction.
22 None of these three have taken into account addiction
23 into their class size estimate.

24 That's not a relevant consideration, their
25 estimates are not relevant to the issue. For that

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1 reason alone it should be stricken. It would be vastly
2 prejudicial to allow an inflated number to go into this
3 jury which would be misleading as to the class size
4 because a central and important element, indeed, as I
5 pointed out, the one that got the class certified in
6 the first place, took it into account. Dr. Cummings
7 went so far as to say he didn't think it was relevant.

8 Now, the reason why a lot of these experts
9 went off track, they didn't even know what the
10 definition was when they began this process, so it's no
11 surprise that they wound up with the wrong thing. So
12 that is as far as it went.

13 But that's not the only problem. But I'm
14 going to draw a circle here to represent where
15 addiction is, because that would be a smaller number.
16 That is, of all the people who are smokers or former
17 smokers who have a smoking-related disease, whose
18 disease was caused by their smoking, how many of those
19 are addicted? No calculation of that, their estimates
20 are irrelevant.

21 But that's not the end of the story and the
22 question is: Why do I say that? Your order on August
23 2nd, Your Honor, changed everything for this phase. In
24 that order you changed the trial plan to provide that
25 we are going to, in this phase, come up with one lump

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1 sum for the entire class.

2 And Your Honor considered the alternatives
3 that you thought were viable on the table right then,
4 ratio, lump sum. And in deciding that lump sum was the
5 correct way to go -- I'm not going to reargue that,
6 we've had plenty of argument on that -- you said that
7 one would have to know the approximate size of the
8 class in order to establish an appropriate standard
9 amount to be assessed for the entire class.

10 And in your order, Your Honor spoke of the
11 entire qualified class. And by that Your Honor meant
12 the class that's going to be entitled to recover
13 damages. And you went on to say that this approximate
14 size of the class is going to be reduced to the
15 qualified class by, you said, the vagaries of law and
16 trial.

17 Now if, you said, the estimated class were
18 much larger than the qualified class, there's going to
19 be a windfall, because there's going to be much more
20 potentially to split among a smaller group than
21 anticipated, and you said it could happen the other

22 way, but obviously, the likelihood is there's going to
23 be a windfall. That's a problem, but it's not the
24 biggest problem. The biggest problem is the due
25 process, because as the BMW and its progenies said, a

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1 punitive damage award must be proportional to the
2 injuries suffered by the plaintiff.

3 So, in order to make the punitive damages
4 award more proportional and to reduce, as you noted,
5 the potential for a windfall, what Your Honor did, what
6 your order provided was that punitive damages be
7 determined in relation to the qualified class and doing
8 that is important to our due process rights.

9 And it can be done, Dr. Burns said it can be
10 done, but they haven't done it. Two levels of this
11 analysis. First of all, these people, the smokers with
12 disease caused by smoking who are addicted, how many of
13 them, which of them were affected in their smoking and
14 in their disease by the wrongful conduct of the
15 defendants?

16 How many? That's a calculation that's a
17 smaller number. None of these witnesses have even
18 attempted to do that. And, of course, in our view, and
19 we've argued, I won't argue again, that requires an
20 individual trial, and that is the reason why we were
21 against the trial plan.

22 But how do we do the next best thing? How do
23 we ensure that the defendants do not pay punitive
24 damages on account of class members who will never
25 recover anything? That's the central issue here. How

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1 do we reduce the possibility that the jury's award will
2 be too high because it takes into account numbers of
3 class members who at the end of the day will recover
4 nothing? How do we do that? The shorter answer is the
5 plaintiffs have made no effort to attempt that. None.

6 Lastly, Your Honor, that's not even the end
7 of this story, because, as you said, there will be some
8 class members who can prove everything, but because of
9 some problem, statute of limitations, they're not going
10 to recover. So that's another level of analysis.

11 And this, Your Honor, this inner circle,
12 that's your qualified class. We will hear no testimony
13 from these experts about the qualified class. Barring
14 that, we're not talking about the right number, the
15 relevant number.

16 And, Your Honor, I just want to mention it, I
17 know Your Honor has ruled in a sense on this, but
18 there's one more calculation that is deeply relevant to
19 this. That, Your Honor, is the Medicaid population.
20 Some of them, the state was subrogated to their rights
21 to punitive damages. And the state recovered, under
22 the FSA, according to its terms, punitive damages.

23 In our judgment, Your Honor, some portion of
24 this inner circle should be taken into account. You
25 can't do it by setoff, because this is the number

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1 without the overlap, that the jury needs to know in
2 order not to inflate their award.

3 So in summary, Your Honor, Dr. Davis and the
4 other plaintiffs' witnesses on class size do not even
5 start out with the right numbers, they don't take into
6 account addiction, they don't take into account the

7 conduct, they don't take into account the potential for
8 defenses that will defeat them. And thus, they do not
9 estimate the class size that is relevant, namely, the
10 class that's going to recover. And that is what they
11 have to base a lump sum punitive damages award.

12 Consider, Your Honor, what the alternative --
13 if there's 300 to 500,000, as counsel has said in his
14 opening statement, that's this number, that's this
15 number. But let's say that the qualified class is a
16 10th of that. You don't think that there's a good
17 chance a jury will award damages five to ten times as
18 high as it should because they have the wrong number?
19 That is a danger that we should not be taking. And to
20 take it would violate defendant's due process rights.

21 That's my presentation on class size, Your
22 Honor, but we have a few other points to mention.

23 I'm not going to spend really any time on the
24 FDA issue, looms large with Dr. Davis. Your Honor has
25 ruled, as I understand it, that the opposition to the

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1 FDA is not a relevant consideration, and therefore
2 Dr. Davis can't do things like he did in his
3 deposition, and say he agrees with the dissent and
4 things like that. That's not an issue in this case.
5 He can't attack our tactics in litigation. He can
6 point out inconsistencies, as I understand Your Honor's
7 ruling, but he can't say that we were committing fraud
8 in this court or that court the way he has suggested.

9 But there are two areas I do want to focus on
10 with respect to Dr. Davis in particular. One is
11 advertising. Dr. Davis is a medical doctor, we've
12 heard before on epidemiology and this sort of thing,
13 Your Honor heard from him as far as epidemiologic
14 cause. We heard some of that in II-A. And we heard a
15 lot from him in Phase I concerning causation of disease
16 and what he did and in the Surgeon General's Reports.

17 He is not an advertising expert. He's not an
18 expert in child psychology, he's not an expert in how
19 to design a program that will discourage kids. He's
20 not an expert on advertising that appeals to kids.

21 Moreover, advertising was added to this
22 witness' scope at the last second.

23 Here's what happened, here's the story, Your
24 Honor. He had a punitive damages deposition at point
25 A. And at the end of that, he had not done his

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1 calculations on class size. We came before Your Honor
2 and said: We need another deposition.

3 In fact, that was agreed to. And when Your
4 Honor, at the end of the first deposition, it was
5 stipulated between the parties that the only issue to
6 be covered in his deposition was class size. That was
7 the only thing that hadn't been covered from his
8 disclosure. Then what happened was right before his
9 next deposition, they threw in two huge areas,
10 advertising and youth marketing.

11 Given the time that we had, there was no
12 way -- the deposition was pushed to 12:00 and then it
13 started an hour and 45 minutes late. There was no
14 opportunity, Your Honor, to examine him on advertising.
15 It was thrown in at the last second. He is simply not
16 an expert on advertising or what appeals to kids. He's
17 a medical doctor, an epidemiologist, he should be

18 limited to that area.

19 Two other quick points. This, the
20 disclosures contemplate, for all three of these
21 experts, that they're going to cover Phase I conduct.
22 Your Honor has ruled that out. I just want to alert
23 you to this issue because it's going to come up.

24 They also say that all three will talk to the
25 degree of reprehensibility. I don't know if there is

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1 such a thing as an expert in reprehensibility; if there
2 is, it's not these three gentlemen. That's really an
3 issue for -- that's so uniquely a jury issue, what is
4 reprehensible, what is not. Let Mr. Rosenblatt argue
5 that on closing statement. But it's really not for an
6 expert to get up here and say: I think it was awful, I
7 think it was reprehensible, I think they're still doing
8 terrible things.

9 Let them talk to the facts. Let the jury
10 make up their mind if the conduct that they found in
11 Phase I is continuing to today.

12 Your Honor, there are a number of other
13 issues. I'm going to leave them to, as Your Honor had
14 suggested, as best I can, to objections, understanding
15 that there are many, many other problem areas, but, you
16 know, we don't want to hold things up unnecessarily
17 this morning. And I thank you for listening.

18 MR. ROSENBLATT: Judge, after all the
19 testimony of Dr. Davis in Phase I and Phase II and
20 depositions, on this phase alone there have been three
21 depositions, each one over 200 pages. And they
22 basically do this to create a situation, knowing in
23 advance what they intend to do.

24 And to come in and argue a motion in limine,
25 to take the position that they are unprepared about

19

1 anything that Dr. Davis -- he has talked about
2 everything under the sun in his depositions.

3 Just as a reminder, Dr. Davis was the
4 director of the Office of Smoking and Health. He
5 oversaw the production of several Surgeon General
6 Reports. As you know, he is an MD, he's
7 board-certified in the field of prevention, and he is
8 an epidemiologist.

9 Basically, the briefs -- and they are --
10 these are -- the motion in limine, these are the
11 equivalent of appellate briefs that we get handed the
12 night before a witness, who has been disclosed way in
13 advance, is to testify. We get the equivalent of
14 appellate briefs.

15 Essentially what's been done here today is
16 they have reargued legal issues and prior rulings that
17 they've lost. They're also disguised positions for
18 decertification. Again, we're hearing, and absolutely,
19 100 percent, you're right, there's no mystery that the
20 size of the class cannot be determined with
21 mathematical precision. There's no question. They
22 know that and you know it, and everyone in the world
23 knows it, because, unfortunately and tragically, class
24 members are dying every day as a result of the -- so,
25 of course, the class is an estimate.

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1 And they are well aware that -- they are well
2 aware of the fact and Your Honor has recognized that in

3 earlier rulings, these arguments. And Mr. Dodds,
4 apparently his only purpose in this phase is to argue
5 motions in limine. He's a specialist in arguing
6 motions in limine.

7 These arguments were made and rejected before
8 the Third District Court of Appeal and the Florida
9 Supreme Court on several, on several occasions.

10 And they're basically -- we didn't use the
11 correct definition of the class. Now, for example,
12 Judge, they argue that the size of the class should not
13 be based upon how many class members' injuries were
14 caused from smoking, but rather how many class members'
15 injuries were caused from addiction. Now, this totally
16 contradicts the defense, the position they take
17 throughout the case, that there are no addiction, as an
18 injury, claims.

19 Moreover, the defendants strenuously argued
20 against any questions during Phase II as to whether the
21 three class representatives were addicted. And we
22 ultimately agreed not to submit that question on the
23 verdict since the defense said it was unnecessary and
24 objected to the question which we had proposed.

25 Everything that counsel has gone over is

21

1 clearly an issue for cross-examination and has nothing
2 to do with the admissibility of the opinion of the
3 witness.

4 Obviously, you ask Dr. Davis: Well, you're
5 only taking into account deaths, you're not taking into
6 account the people that are --

7 Yes, that's true. Make your point on
8 cross-examination.

9 And significantly, Judge, they're not
10 presenting any witness who gives a contrary opinion.
11 They don't have a witness that's going to come in and
12 say: This is the number.

13 Clearly, Judge, the role of the expert is to
14 utilize statistical data in a very traditional,
15 standard way, to advise this jury of the estimate as to
16 class size. And Your Honor has seen it in all kinds of
17 trials where a highly qualified expert comes in, gives
18 opinions, whatever the topic, and the focus of cross
19 examination is to attack the methodology, and that's
20 fine, that's a legitimate area of cross examination.
21 But it does not go to exclude the witnesses.

22 And we see, we see what's happening here,
23 we're back to the old argument. Just like they have
24 not accepted these verdicts, they have not accepted
25 many of your rulings. We're back to the old argument,

22

1 in essence: Well, we've really got to have all the
2 compensatory trials before we have the punitive damage
3 trial.

4 And they argue that it's the responsibility
5 of these experts to estimate the total amount of
6 compensatory damages that will eventually be awarded to
7 the class. That's absolutely not relevant here, since
8 punitive damages are obviously punishment damages. Nor
9 would it be appropriate, it would be the height of
10 speculation for experts to give their opinions as to
11 how many class members will succeed in front of
12 different juries.

13 The defendants, Judge, when they had a

14 different goal in mind, have estimated the size of the
15 class in excess of one million people in numerous
16 pleadings before the Third District Court of Appeal and
17 Florida Supreme Court. And they're bound by those
18 arguments, they're bound by those representations.

19 Of course, the reason they overestimated the
20 size of the class was because they thought that was a
21 very good argument for decertification. And it was
22 rejected.

23 I'm going to try to shorten this up. Oh, on
24 the issue of advertising, you can see, and we've heard
25 it in previous testimony, and Dr. Davis addressed

23

1 issues of advertising during all three of these
2 depositions, the only thing that happened on the last
3 deposition is he brought with him a few magazines. He
4 said: Here, I consider these particular ads to be
5 representative.

6 They made the point, which is 100 percent
7 correct, that he doesn't have a degree in advertising.
8 But he explained why he considers himself to be an
9 expert in tobacco advertising. He's written on the
10 subject, articles have appeared in the New England
11 Journal of Medicine, the Journal of the American
12 Medical Association. He was the editor of a
13 publication called Tobacco Control. So, although he's,
14 you know, an MD, on the subject of tobacco and health
15 and advertising and what appeals to teenagers, he,
16 without question, is an expert.

17 In any event, Your Honor should listen to the
18 testimony, should listen to the qualifications, should
19 listen -- again, you're being asked to make rulings in
20 a vacuum.

21 And we submit that Dr. Davis should be
22 permitted to testify in the normal fashion. Let's see
23 what happens. They'll make their objections, if
24 sidebars are indicated. But essentially what they're
25 talking about is areas of cross examination. There's

24

1 no reason to limit, there's no reason to limit
2 Dr. Davis before you've heard any portion of his
3 testimony.

4 MR. DODDS: Your Honor, I think we are the
5 ones who have in fact listened to Your Honor's rulings
6 and have made an effort to ensure that they be
7 followed. And it's these experts and plaintiffs who
8 have not.

9 We obviously disagreed with Your Honor. We
10 did think that this would not lend the precision
11 necessary to meet with the due process requirements.
12 We lost that before Your Honor, and we're not going to
13 challenge that now. We're not asking for precision in
14 reaching the correct number. We only ask that these
15 witnesses try. And they do not. They do not use the
16 class definition. You can't get the right result
17 unless you use the right definition. This is not cross
18 examination, it's fundamental.

19 Secondly, Your Honor, there's no argument,
20 and we're not making one here that addiction is an
21 injury. The definition, though, says that addiction
22 was why they kept smoking. And that's an element in
23 how they got sick. That's the allegation. There's no
24 consideration of it in these opinions.

25 We don't have any burden to come before this
25
1 Court and prove up this estimate. That's a false
2 argument, has nothing to do with it, should be rejected
3 out of hand.

4 Lastly, Your Honor, yes, of course we do
5 believe that compensatory damages are essential to know
6 before you render a verdict on punitive damages. We
7 believe the Supreme Court has said that. Because you
8 can't judge proportionality without it. Your Honor has
9 rejected that argument, I'm not here to reargue it.
10 But I will say that it's nice to try, to get a little
11 closer, to give the jury something to base
12 proportionality on.

13 And these estimates don't do it, they don't
14 try.

15 I agree with counsel, it is the height of
16 speculation to attempt to estimate the numbers
17 necessary to meet the due process standard of
18 proportionality. That's why it's unconstitutional to
19 do it this way, but Your Honor has rejected that
20 argument. And all we can do is try. These experts
21 don't try. All they do is try to come up with the
22 biggest number because that gets the biggest verdict.
23 That's inappropriate.

24 The issue is whether or not they have made
25 the effort to meet what Your Honor in your August 2nd

26
1 order provided, namely, a class size estimate that
2 avoids a windfall and permits some effort at the
3 proportionality mandated by our constitution.

4 With regard to his qualifications, let's hear
5 them. But thus far there aren't any that would warrant
6 using this -- if we hear from Dr. Davis on advertising,
7 we heard yesterday from Dr. Richmond on advertising.

8 Does that mean they get to come in with their
9 slated witness and have Dr. Siegel talk about
10 advertising, Dr. Blum, Dr. Cummings, Dr. Whelan,
11 they're all listed on the same issues. I guarantee you
12 that you will hear the same testimony from multiple
13 witnesses, the same cross examination. We'll have the
14 same problem of repetitious and prejudicial we've had
15 time and time again. It's going to prolong this trial.
16 It's not necessary. If this is the best they have on
17 advertising, fine, let's hear from him.

18 I suggest his testimony is inappropriate. It
19 wasn't disclosed. They stipulated it wouldn't be
20 covered in his last deposition. And if Your Honor
21 overrules us on that, then I understand that this is
22 it, this will be it on advertising.

23 But with respect to class size, I suggest
24 this is not an issue that's just about cross
25 examination, this goes to our constitutional rights and

27
1 relevance. We're not talking about nitpicking around
2 the edges, one or two here; we're talking about
3 something far more fundamental, and it just can't be
4 brushed aside to say it has to be heard in context or
5 to say that you can add a few here or make it up there.

6 This jury is going to be misled with this
7 evidence, misled, because it doesn't even start from
8 the proper premise.

9 THE COURT: Thank you.

10 All right. The issue of class size is a
11 matter for testimony, cross examination, as far as this
12 Court is concerned. What they say, they've got to back
13 up.

14 You can cross examine on any of these issues
15 and show the error of their ways if you can. You have
16 your theories, they have theirs. That's no problem.

17 I think we resolved the issues of the
18 reference to the FDA and anything with regard to
19 Noerr-Pennington, so I don't suspect we'll get into
20 that area too deeply, if at all.

21 As far as, I know they did mention in one of
22 their briefs the trial tactics and the position that
23 the attorneys took during the course of the trial. I
24 think we resolved that issue, except that I do think
25 it's appropriate for the plaintiff to be able to say

28

1 that the position of the defendant companies and the
2 corporations was such and such and so and so, in that
3 they took the position it never had been proven and so
4 forth. Even though the lawyers come in and talk about
5 it in court, that's still the position of the companies
6 and I think that's fair game.

7 As far as the advertising is concerned, there
8 is a two-expert rule. And you should be aware of it.

9 MR. ROSENBLATT: I certainly don't consider
10 that Dr. Richmond was an expert on advertising. You
11 know, basically I asked him one question, Judge, and
12 that had to do with his expertise --

13 THE COURT: What I'm telling you is there's a
14 two-expert rule.

15 MR. ROSENBLATT: To be absolutely frank with
16 the Court, because Dr. Siegel is our main guy on
17 advertising.

18 THE COURT: Keep that in mind.

19 MR. SMITH: Your Honor --

20 MR. ROSENBLATT: So, in my mind Dr. Davis and
21 Dr. Siegel.

22 MR. SMITH: We went into advertising, he held
23 up Glamour, he talked all about the Virginia Slims ad
24 after ad, the man talked about advertising. And to say
25 that doesn't count, Your Honor, is ridiculous.

29

1 MR. ROSENBLATT: On direct examination --
2 that all came out on cross. On direct examination, I
3 only asked the goody two shoes, and it was in the sense
4 of someone who has been a pediatrician for 60 years,
5 the impact. They opened the door, which Mr. Webb asked
6 for Glamour magazine, not me.

7 THE COURT: I don't consider Dr. Richmond
8 came in and was presented as an expert in advertising
9 for that purpose. That was rather peripheral. You
10 have Dr. Siegel and who else?

11 MR. ROSENBLATT: And Dr. Davis.

12 THE COURT: Those two.

13 MR. WEBB: Judge, I'm the one that got stuck
14 yesterday then. A man who has no expertise at all, at
15 all, was allowed to testify very damaging testimony,
16 and now he's not even an expert. How could he testify
17 if he's not an expert?

18 THE COURT: I don't want to get into this.

19 MR. WEBB: Well, I move to strike it.

20 THE COURT: Denied.

21 Your purported experts are going to be
22 Dr. Siegel and Dr. who, if any, or just Dr. Siegel?
23 MR. ROSENBLATT: I'm thinking ahead. And
24 obviously, obviously we have the option of dropping a
25 witness here and there, witness here and there.

30

1 Dr. Siegel is our number one person. I'm thinking
2 about people like Dr. Blum.
3 THE COURT: Well, either they're an expert
4 and they're going to testify in a particular field or
5 they're not. If they're going to testify in two or
6 three fields, then they're going to be deemed to be an
7 expert in those particular fields. You have to
8 delineate that. If this is not the person, Dr. Davis
9 is not the one, so be it. That's your choice at this
10 point. But there is this rule which we're going to go
11 by.

12 Okay. So that's where we stand.
13 MR. ROSENBLATT: So I will try to tell
14 Dr. Davis what the framework is.
15 THE COURT: All right, we'll take a recess
16 until you can get that all put together.
17 (A brief recess was taken.)
18 THE COURT: All right, have a seat. All
19 right.
20 Just an observation that we all ought to keep
21 in mind. Many, many, many, if not all of the major
22 issues in this case have already been resolved by two
23 verdicts of the jury. What we are in now is punitive
24 damage phase, the end result of verdicts that resolved
25 issues.

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1 I do not intend to retry any of those issues.
2 So don't try. I know you'd love to. But don't try.
3 All we're here is a very narrow facet of this
4 case, and that is called the punitive damage phase.
5 It's easy to fall into the trap of trying to bring up
6 issues that you really agree or disagree with that went
7 against you in one fashion or another. But I'm not
8 going to retry Phase I and I'm not going to retry Phase
9 II.

10 All right, bring the jury out.
11 THE BAILIFF: Bringing in the jury. Jurors
12 entering the courtroom.

13 (The jurors entered the courtroom.)
14 THE COURT: All right, folks. Have a seat,
15 please.

16 The lawyers and I have been meeting already
17 this morning and we're still late. So no matter what I
18 do -- I could call us in all together at 6:00 in the
19 morning, I guess, and we'd still be late. But I do
20 apologize. But we're not as late as we normally are.
21 We're cutting down, whittling it down.

22 Has anybody been exposed to any information
23 over the evening, from newspapers, radio, television or
24 any other form of communication, regardless of type,
25 about this case or any of the issues?

32

1 THE JURY PANEL: No, sir.
2 THE COURT: Everybody still have an open
3 mind?
4 THE JURY PANEL: Yes, sir.
5 THE COURT: All right. You may call your

6 witness, please.
7 MR. ROSENBLATT: Dr. Ronald Davis.
8 Thereupon:
9 RONALD M. DAVIS, M.D.
10 having been called as a witness, was duly sworn,
11 examined, and testified as follows:
12 DIRECT EXAMINATION
13 BY MR. ROSENBLATT:
14 Q. Dr. Davis, you, like Dr. Richmond, are in
15 familiar surroundings?
16 A. Yes.
17 Q. Remind the jury, please, of your name and
18 your present professional address.
19 A. My name is Ronald M. Davis, and I work at the
20 Henry Ford Health System in Detroit.
21 Q. You are a medical doctor?
22 A. Yes.
23 Q. Board-certified in preventive medicine?
24 A. Still.
25 Q. I'm going to just, very, very quickly take

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1 you through a couple of things in your background.
2 You were a medical epidemiologist with the
3 Division of Health, Education Center for Health
4 Promotion Centers for Disease Control from when to
5 when?
6 A. In the early and mid 1980s I was located in
7 that part of the CDC, in Atlanta.
8 Q. Now, there came a point in time when you
9 became the -- held a federal position, the director of
10 Office on Smoking and Health?
11 A. Correct.
12 Q. And during the period of time that you were
13 director of the Office on Smoking and Health, how many
14 Surgeon Generals reports were published?
15 A. Three.
16 Q. What were the titles of them?
17 A. The 1988 report on nicotine addiction.
18 The 1989 report, which we refer to as the
19 25th anniversary report, which was entitled Reducing
20 the Health Consequences of Smoking, 25 years of
21 Progress. It looked back on 25 years of changes in
22 smoking and health since the first Surgeon General's
23 Report was released in 1964.
24 And then the third one was the 1990 report on
25 the health benefits of quitting smoking.

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1 Q. And then you left that federal position, you
2 took a state position, you became the chief medical
3 officer of the Michigan Department of Public Health?
4 A. That's correct.
5 Q. And is that the job you functioned in before
6 your present position?
7 A. Correct.
8 Q. In your present position, you are a salaried
9 physician?
10 A. Correct.
11 Q. Obviously, we went through at some length,
12 during your earlier appearances here, in much more
13 detail, your background and some of the articles that
14 you've written. I only intend to touch upon a couple
15 of them.
16 By the way, in terms of the articles that you

17 have published, have some of your articles appeared,
18 for example, in the New England Journal of Medicine?
19 A. I did publish a paper in the New England
20 Journal of Medicine, yes.
21 MR. UPSHAW: Your Honor, I would object.
22 Dr. Davis has been here before.
23 THE COURT: We have heard it and the jury has
24 heard the prior background. Just a question of
25 reminders of all the witnesses, which niche he falls

35

1 into. We don't have to go back and review everything.
2 BY MR. ROSENBLATT:
3 Q. Now, let me ask you about one particular
4 article that you did, the title of which was Current
5 Trends in Cigarette Advertising and Marketing, in the
6 New England Journal of Medicine, in 1987. Just tell us
7 generally what that article involved.
8 A. It looked at trends in cigarette advertising,
9 as the title implies, how much money the cigarette
10 companies are spending on cigarette advertising, what
11 types of advertising they are producing, what media
12 they are putting their ads in, newspapers versus
13 magazines versus transit versus point of sale, which
14 populations they are targeting, such as kids,
15 minorities, women, blue collar workers. Those are the
16 kinds of issues that that article looked at.
17 Q. And just one other item on your curriculum
18 vitae, you did an editorial which appeared in the
19 Journal of American Medical Association, entitled
20 Reducing Youth Access to Tobacco. Correct?
21 A. Correct.
22 Q. So, in other words, in addition to being an
23 MD, you have addressed other issues as they relate to
24 the general field of smoking, and how smoking impacts
25 various segments of American society; is that fair?

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1 A. That's correct.
2 Q. Now, let me get into a specific topic with
3 you, Dr. Davis. Did you do some calculations regarding
4 the size of the Florida class -- this is a class
5 action -- the size of this class?
6 A. Yes. I did some calculations on one
7 important aspect of the size of the class.
8 Q. Explain to the jury what you did, what your
9 methodology was, which enabled you to arrive at at
10 least an aspect of the size of this Florida class.
11 A. What I focused on was number of people in
12 Florida who have died from diseases caused by smoking.
13 I began with calculations from the CDC, the Centers for
14 Disease Control and Prevention. And I also obtained
15 information from the Florida Department of Health on
16 number of people in Florida who have died from diseases
17 caused by smoking.
18 Those figures from the CDC and from the
19 Florida Department of Health covered six different
20 years. I focused on the 1990s, that ten-year period of
21 time.
22 And I'm looking at a few tables that I
23 generated as I did my work.
24 The CDC estimates pertained to the years 1990
25 through 1994. For each of those years the CDC

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1 estimated that 29,060 people in Florida each year, on

2 average, died from diseases caused by smoking.
3 The Florida Department of Health came up with
4 an estimate for 1996 which was just a little bit higher
5 than that figure that the CDC found for the earlier
6 years. And the Florida Department of Health's figure
7 was 30,363 deaths caused by cigarette smoking in
8 Florida for that year.

9 I then, based on certain assumptions, derived
10 some estimates for the other years during the decade of
11 the 1990s, the year 1995, and then the years 1997
12 through 1999.

13 When I added up all of these deaths directly
14 caused by smoking, the grand total, based on the
15 assumptions that I made, ranges from 292,000,
16 approximately, to 296,000.

17 Q. Smokers who have died during the '90s in
18 Florida as a result of a disease caused by smoking?

19 A. Correct, both smokers and ex-smokers.
20 Because even after people quit smoking, they have some
21 residual risk from their many years of smoking. So
22 these estimates would include both current smokers and
23 ex-smokers who died from smoking.

24 And I can explain, if you'd like, how these
25 calculations were derived.

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1 Q. Yes, please do. And the range, why is there
2 a range, although it's a narrow range, between 292,000
3 and 296,000?

4 A. Well, first let me address why there's a
5 range. Let me take that back. It will be easier to
6 explain why the range if I answer your other question
7 first, and that is, how are these calculations done?

8 These calculations are based on a formula,
9 mathematical formula, referred to as attributable risk.
10 And to explain it in simple terms, it's a mathematical
11 formula where you need to know two things, you need to
12 know the prevalence of smoking in the population, that
13 is, the percentage of people in the population who
14 smoke.

15 For example, now it's about 25 percent in the
16 United States, about 25 percent of adults currently
17 smoke cigarettes. So that's one number that you need
18 to know.

19 The other number is called relative risk.
20 And that is the ratio of the risk of getting a certain
21 disease in smokers versus people who have never smoked.

22 So for men, for example, the men who smoke,
23 their risk of getting lung cancer is about 22 times the
24 risk of men who never smoked getting lung cancer. So
25 that's the relative risk estimate. It would be 22.

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1 And again, that's for men who smoke getting lung
2 cancer. So they have a 22-fold higher risk of getting
3 lung cancer compared to men who never smoked.

4 So we need to come up with a relative risk
5 estimate like that for men, for women and for all the
6 different diseases, for lung cancer, throat cancer,
7 heart disease, stroke and so on.

8 And when we do those calculations, we get the
9 number that's called attributable risk. And
10 attributable risk is the proportion of the disease or
11 deaths from that disease that are directly caused by
12 smoking.

13 So, for lung cancer it might be something
14 like 85 percent. 85 percent of all deaths from lung
15 cancer are directly caused by cigarette smoking. There
16 are a few other lung cancer deaths that are not caused
17 by cigarette smoking. Asbestos exposure might be a
18 cause for people who work in a shipyard for many years,
19 for example.

20 For heart disease, the attributable risk
21 would be something like 20 percent, 20 percent of heart
22 disease deaths can be directly attributable to smoking
23 in the United States. Other heart disease deaths are
24 caused by other things: High cholesterol level, high
25 blood pressure, being overweight, and so on and so

40

1 forth.

2 So, we take the attributable risk, for
3 example, 85 percent of lung cancer deaths are caused by
4 smoking. Then we have to know how many deaths from
5 lung cancer occur in the state of Florida. And we find
6 that number from our vital records, from death
7 certificates, and then we multiply that number by 85
8 percent.

9 So if, for the sake of argument, there are
10 1,000 deaths from lung cancer, then we take 85 percent
11 of that, 1,000 deaths from lung cancer in the State of
12 Florida. And we take 85 percent of that and say 850 of
13 those 1,000 deaths from lung cancer were directly
14 caused by cigarette smoking.

15 So that's what the attributable risk formula
16 allows us to do. And that's how the CDC derived its
17 estimates, and that's how the Florida Department of
18 Health derived its estimate, using this standard,
19 well-accepted formula for attributable risk, and then
20 finding out how many deaths are attributable to a
21 particular cause, in this case cigarette smoking.

22 That gives you the background. And I hope I
23 didn't go too long with that background.

24 Now that would allow me to explain why the
25 range, if you want me to proceed.

41

1 Q. Before you get the range, in terms of some of
2 the terms that you've used, attributable risk, relative
3 risk, these are terms that are very common in the field
4 of epidemiology, which the jury has heard a lot about,
5 correct?

6 A. Correct.

7 Q. Now tell us why the range.

8 A. Well, I didn't have data for smoking
9 attributable deaths in Florida for 1997, 1998 and 1999.
10 So to derive those estimates, I needed to ask myself:
11 What would happen to the attributable risk for those
12 last three years of the 1990s?

13 And as I mentioned, there are two things that
14 go into attributable risk. One is prevalence of
15 cigarette smoking and the other is the relative risk.
16 Well, the relative risk won't change over those years
17 because we use the relative risk estimates from the
18 best study that's available, and that's the current
19 population -- I'm sorry, that's the Cancer Prevention
20 Study 2, which was done by the American Cancer Society
21 in the mid 1980s. That's the best study available.
22 That's the one we use.

23 The relative risks come from that study and

24 they won't change. So the only thing that will change
25 for the attributable risk for these last three years of

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1 the 1990s is the prevalence of smoking.

2 So I looked at the prevalence of smoking,
3 comparing 1996, which is the last year for which I had
4 data from the Florida Health Department, and then 1997,
5 which is the last year that I had information on the
6 smoking rate for Florida. And I saw that the smoking
7 rate actually went up from 1996 to 1997 in Florida,
8 from 21.8 percent to 23.6 percent.

9 So what that told me is that the smoking rate
10 looked like it might actually be going up, moving into
11 those three years where I had no estimate. And if the
12 smoking rate is going to go up, then that is going to
13 increase the attributable risk estimate.

14 In other words, instead of 85 percent for
15 lung cancer, it might be 87 percent, if you factor in
16 that higher smoking rate.

17 So, actually one possibility would be that
18 this number of deaths would actually go up in those
19 last three years.

20 There's one other issue though that you have
21 to take into account in looking at where the trend
22 might be going, that is: Well, how many deaths are
23 occurring from lung cancer and heart disease and stroke
24 in the State of Florida, and what's that trend?
25 Because that can also affect the bottom line.

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1 So I also looked at the trends in death rates
2 from smoking-related diseases in Florida, heart
3 disease, stroke, overall cancer death rates and lung
4 cancer, as well as chronic obstructive pulmonary
5 disease.

6 What I found was that for several of these
7 disease categories, the death rate was going down
8 slightly, comparing 1996 and 1998; whereas, it was
9 going up slightly for chronic obstructive pulmonary
10 disease.

11 So in this case, the death rate trends might
12 lead to slightly lower estimates of deaths caused by
13 smoking. So the way I put this together is, the
14 disease trends might result in the deaths from smoking
15 going down slightly, the trend for smoking might result
16 in the estimate of deaths caused by smoking going up a
17 little bit. So maybe those two would result in a
18 washout effect. Maybe there wouldn't be any change.

19 So one assumption I made is that the rate
20 of -- is that the number of smoking-caused deaths
21 wouldn't change after 1996. In other words, the figure
22 from the Florida Health Department, 30,363, might
23 continue for 1997, 1998 and 1999.

24 So, maybe my best guess might be all these
25 trends I talked about, they'll wash each other out, and

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1 we'll just continue on with approximately the same
2 number of deaths for those last three years.

3 But to be conservative, to be extra cautious
4 about it, I also assumed that smoking-caused deaths
5 would go down by either 2.5 percent for those last
6 three years or by 5 percent for those last three years.
7 So that's where my range comes in, from an assumption
8 that the number would not change in the late 1990s,

9 which is my best guess, to the more conservative
10 assumptions that the deaths would go down slightly.
11 And so that's why my estimates ranged from
12 about 28,800 to 30,400 for each of those years, 1997,
13 1998 and 1999. Not a huge range. Then, if you factor
14 in those ranges, that will affect the bottom line for
15 the entire decade so that you'd have a range of, as I
16 said before, about 292,000 to about 296,000.

17 Q. Now, in 1987, when you were the director of
18 the federal Office on Smoking and Health, were you
19 involved in preparing an article on smoking
20 attributable deaths in the United States for the
21 Centers for Disease Control's publication called
22 Morbidity and Mortality Weekly Report?

23 A. Yes.

24 MR. UPSHAW: Objection, Your Honor. Your
25 Honor, this is Phase I. 1987.

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1 THE COURT: Overruled. As it relates to this
2 particular issue and his study for testimony in this
3 case, I have no problem with it.

4 BY MR. ROSENBLATT:

5 Q. And did that article estimate the deaths
6 caused by smoking throughout the United States during
7 the year 1984?

8 A. Yes, it did.

9 Q. Now, in 1989, you oversaw the production of
10 the 1989 Surgeon General's Report; is that correct?

11 A. Yes.

12 Q. And did that report have an entire chapter on
13 smoking attributable deaths?

14 A. Yes, it did. It was Chapter 3, in fact.

15 Q. Did it compare the death rates throughout the
16 United States in different time frames?

17 A. It compared deaths caused by smoking in the
18 United States for the year 1965, with deaths caused by
19 smoking in the United States in the year 1985.

20 Q. Have you been the author of an article on
21 Deaths of Chronic Pulmonary Disease Caused by Smoking?

22 A. Yes.

23 Q. Where was that article published?

24 A. It was published in, I think it was the
25 American Review of Respiratory Diseases, probably the

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1 leading journal for respiratory diseases. I don't have
2 the exact citation with me.

3 Q. That's a peer-reviewed journal?

4 A. That's right.

5 Q. And in 1996, were you the co-author of a
6 paper on Deaths Caused by Pipe Smoking?

7 A. Yes.

8 MR. UPSHAW: Judge, I'm going to object, this
9 is a way to do the CV.

10 MR. ROSENBLATT: Well, let's not have
11 speaking --

12 THE COURT: If it relates to this particular
13 effort on the witness' part to prepare for the
14 testimony now --

15 MR. ROSENBLATT: Exactly.

16 THE COURT: -- then I think it's relevant.
17 Overruled.

18 BY MR. ROSENBLATT:

19 Q. And that paper on Deaths Caused by Pipe

20 Smoking was published where?
21 A. I think it was the Journal of Preventive
22 Medicine.
23 Q. And is that a peer-reviewed journal?
24 A. Yes.
25 Q. Now, these various studies that you worked on

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1 in the Surgeon General's Reports, the other
2 publications that you mentioned, were those studies
3 based on the epidemiological calculations which you
4 have already described to the jury?
5 A. That's right. The same standard formula for
6 attributable risk.
7 Q. The same essential methodology and technique?
8 A. Correct.
9 Q. Now, in terms of your calculations, they tell
10 you how many deaths in the population were caused by
11 smoking, but they don't really tell you exactly who
12 those people are; is that correct?
13 A. That's correct.
14 Q. Is there any way to identify individuals as
15 opposed to general segments of the population who died
16 from diseases caused by smoking?
17 A. Yes. The way in which that could be done
18 would be to examine death certificates where smoking
19 could be identified as a cause of the disease that
20 killed the person.
21 Q. Are there states which have on their death
22 certificate forms, where they ask the doctor who
23 certified that someone died and the cause of death,
24 where there's a space or a line having to do with
25 whether smoking was a cause?

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1 A. Yes. There are about three or four states
2 that have a special question on their death
3 certificates that would go something like this: Did
4 cigarette smoking play a role or did cigarette smoking
5 cause the disease that the person died from? Yes, no,
6 maybe. Or yes, possibly, or no. That kind of thing.
7 There are three or four states that actually have a
8 special question on their death certificates that go
9 something like that.
10 Q. Is Florida one of those states?
11 A. No. Not to my knowledge.
12 Q. Have any studies been done to compare the
13 number of deaths caused by smoking using the two
14 methods you've described: Number one, the
15 epidemiological calculations, and number two, the
16 information on death certificates?
17 A. Yes.
18 Q. And what did they show?
19 A. There was a study in Oregon that compared the
20 number of deaths from smoking, according to the
21 epidemiologic calculations, with the number of deaths
22 caused by smoking as indicated by doctors who fill out
23 the death certificates for people who died in the state
24 of Oregon.
25 And again, Oregon is one of those three or

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1 four states that has that special question: Did
2 cigarette smoking play a role in the death of this
3 person?
4 And that study, which was done by researchers

5 at the CDC and at the Oregon State Health Department,
6 found that the two estimates were virtually identical.
7 I believe that the estimate based on the death
8 certificates was 97 percent of the number that came out
9 of the epidemiologic calculations.

10 Q. I believe a subject that came up on one of
11 your depositions was the acronym SAMMEC, S-A-M-M-E-C,
12 and can you explain what that is and how it relates to
13 calculations?

14 A. Sure. SAMMEC is a special computer software
15 program, which stands for Smoking attributable
16 Mortality, Morbidity and Economic Costs.

17 It has been developed by the CDC to allow
18 researchers to calculate deaths caused by smoking. So
19 it can be used to make those calculations for the
20 country as a whole, for individual states, for a
21 particular city even.

22 And the software has in it the relative risk
23 estimates that I mentioned and then it asks the person
24 who is doing the calculations to enter into certain
25 pieces of information such as the smoking prevalence

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1 rates and the number of deaths from various diseases
2 from the population that you're looking at.

3 Q. What is it about SAMMEC, one way or the
4 other, that would make you confident or not confident
5 of the fact of your epidemiological estimates being
6 valid and accurate?

7 A. Well, it has the relative risk estimates from
8 the best study that we have available, which is the
9 Cancer Prevention Study 2, which I mentioned. So it
10 has the best relative risk estimates that we are aware
11 of, which are actually fairly similar to the relative
12 risk estimates from other studies. But it has the
13 relative risk estimates from that study embedded in the
14 software.

15 And then the rest of it is just the
16 information or the data that pertain to the particular
17 population that you're looking at. So the researcher
18 has to enter in that information on smoking rates and
19 number of diseases that people die from, as I mentioned
20 before.

21 Q. Now, Dr. Davis, you've had your depositions
22 taken not only in connection with this class action
23 several times, but you've testified in other cases?

24 A. Correct.

25 Q. And in addition to depositions, you've

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1 actually testified at some other trials; is that
2 correct?

3 A. That's correct.

4 Q. And have you given -- in terms of your
5 testimony, whether by way of deposition or in terms of
6 testifying live at a trial, when you are questioned by
7 tobacco lawyers representing the tobacco companies,
8 have they ever attacked your epidemiological
9 calculations because they don't allow you to identify
10 the individual smokers who died from smoking?

11 A. All the time.

12 MR. UPSHAW: Objection, Your Honor.

13 THE COURT: Overruled.

14 BY MR. ROSENBLATT:

15 Q. So do the tobacco companies support or oppose

16 putting questions about smoking on death certificates
17 so that you could identify individuals --
18 MR. UPSHAW: Objection, Your Honor. Sidebar?
19 Q. Whose deaths --
20 MR. UPSHAW: Sidebar, please.
21 THE COURT: Well, all right.
22 (Proceedings were had at sidebar)
23 BY MR. ROSENBLATT:
24 Q. Dr. Davis, listen carefully to this question,
25 because there are certain areas by virtue of the

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1 sidebar that I would not want you to get into. This
2 question is very narrow. And the question is: In
3 terms of your knowledge, whether in terms of the
4 relationship with the tobacco companies and
5 epidemiologists and the public health authorities, have
6 they opposed providing this information on death
7 certificates?
8 Don't tell us what they've done to oppose it,
9 but I want to know, have they opposed it, the specific
10 information?
11 MR. UPSHAW: Your Honor, objection as to time
12 frame.
13 THE COURT: I think in general, we talked
14 about in general; then if we need to get specific in
15 time, we can do so.
16 A. The information that I have on this is based
17 on what I read in an annual, in a strategy plan for the
18 Tobacco Institute.
19 MR. ROSS: Objection, Your Honor. That's the
20 document I was talking about at sidebar.
21 THE COURT: So. Overruled.
22 MR. ROSS: It's Phase I, and we're
23 relitigating Phase I.
24 THE COURT: It's a whole new ballgame. I'm
25 sorry. Go ahead.

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1 BY MR. ROSENBLATT:
2 Q. I don't want to --
3 THE COURT: The answer is either "yes" or
4 "no."
5 BY MR. ROSENBLATT:
6 Q. And in terms of what you read in the Tobacco
7 Institute's strategic plan, without telling us the
8 details, did the tobacco companies and was the
9 strategic plan to oppose that specific information on
10 death certificates?
11 A. The strategic plan laid out very clearly that
12 they aim to prevent states --
13 THE COURT: Did they or did they not oppose
14 the issue? Either a "yes" or "no" answer.
15 BY MR. ROSENBLATT:
16 Q. Not how they were going to oppose it, but
17 whether they opposed it or were in favor of giving the
18 specific information.
19 A. All that I can say is what I read in the
20 document. And the document says that the Tobacco
21 Institute's strategic plan is to keep those questions
22 off death certificates and to -- and where they are
23 already on death certificates, to get them off, to
24 repeal it.
25 Q. Okay. So the tobacco industry, in terms of

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1 your experience in dealing with the tobacco companies
2 and your experience testifying, the tobacco industry
3 attacks epidemiological calculations because they don't
4 identify the individual smokers who died from smoking;
5 but on the other hand, they oppose asking about smoking
6 on death certificates?

7 MR. WEBB: Your Honor, I object,
8 argumentative, improper question.

9 THE COURT: Well, it's somewhat repetitious
10 here.

11 Let's move on.
12 BY MR. ROSENBLATT:

13 Q. Okay. So, Dr. Davis, so you've given this
14 estimate of between 290,000 and 300,000 deaths caused
15 by smoking in Florida in the 1990s. How does that
16 estimate relate to this class, to this Florida class?

17 A. Well, in a few ways, the estimate will
18 overestimate people in the class, it will include some
19 people who are not in the class, according to the
20 Phase I verdict.

21 For example, these calculations include
22 people who die in fires, who die from burns where the
23 fires are caused by smoking. It will include a small
24 number of deaths from tuberculosis in smokers. And
25 that's included because we know that people with TB who

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1 smoke are more likely to die from their TB than people
2 with TB who don't smoke, because the TB, because the
3 smoking worsens their respiratory condition.

4 It will include a small number of deaths in
5 infants from sudden infant death syndrome because we
6 know that that is linked to smoking by the mother
7 during her pregnancy, or to exposure to secondhand
8 smoke after the baby is born.

9 So those are the few categories, and there
10 might be one or two others, that are in these
11 calculations, but who are not in the class as defined
12 in the Phase I verdict.

13 But these numbers are small. I would
14 emphasize that we might be talking about 1,000 or 2,000
15 people in those estimates I gave you who might be in
16 those disease categories that aren't technically in the
17 class, based on the Phase I verdict.

18 However, the number is a huge underestimate
19 of the class size in that it does not include people
20 who are now alive who have a disease caused by smoking.

21 Q. So obviously, for example, it would not
22 include someone like Mary Farnan or Frank Amodeo?

23 A. Correct, correct.

24 Q. It would include Angie Della Vecchia --

25 A. Correct.

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1 Q. -- who has passed away?

2 A. Correct.

3 And it's very likely that the number of
4 people who are alive but have a disease caused by
5 smoking is much larger than the number of people who
6 have died from a disease caused by smoking.

7 So my impression is that my estimates are
8 much lower than the true class size, but certainly can
9 be looked at as a minimum estimate.

10 Q. What is your familiarity, Dr. Davis, with the
11 Master Settlement Agreement?

12 A. I'm generally familiar with it. I've read
13 portions of it. I've read many summaries of it.
14 Q. Does the Master Settlement Agreement -- what
15 is your familiarity with the global settlement that was
16 entered into that was signed on by the tobacco
17 companies in June of 1997, where Congress did not enact
18 the necessary legislation? Are you familiar with that
19 document?
20 A. I'm familiar with that as well. Sometimes,
21 with all these different settlements that have gone on,
22 the 1997 one, the Master Settlement Agreement, the
23 individual settlements in Florida and Minnesota and a
24 few other states, sometimes it's hard to keep them all
25 straight.

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1 But I was on a committee that looked
2 specifically at that 1997 settlement agreement that the
3 American Medical Association set up.
4 Q. Did the Master Settlement Agreement ban
5 magazine advertising?
6 A. No.
7 Q. Has cigarette advertising in magazines
8 increased since the signing of the Master Settlement
9 Agreement?
10 A. Yes.
11 MR. UPSHAW: Objection, Your Honor,
12 foundation.
13 THE COURT: Yes, I guess we better stay away
14 from it.
15 BY MR. ROSENBLATT:
16 Q. What is your background, specifically in
17 terms of tobacco advertising, specifically, and I would
18 want you to discuss the period of time when you were
19 editor of the publication Tobacco Control.
20 MR. UPSHAW: Your Honor, I'm not objecting to
21 his ability to testify. Just foundation as to his
22 opinion.
23 THE COURT: He hasn't expressed an opinion
24 yet.
25 MR. UPSHAW: He expressed an opinion that

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1 magazine advertising has increased.
2 THE COURT: I thought, the last I recall,
3 maybe I missed one. Well, yes, the question was: Has
4 it increased? Then you objected. And now we're going
5 into whether or not he's got background to render an
6 opinion. He hasn't rendered an opinion yet.
7 BY MR. ROSENBLATT:
8 Q. So the question is, your background, your
9 study, your research, how you became knowledgeable on
10 the subject of tobacco advertising specifically, as
11 opposed to general advertising?
12 A. Well, I've done a huge amount of research on
13 tobacco advertising.
14 I published the paper that you brought up
15 earlier, in the New England Journal of Medicine.
16 I published a paper in the Journal of the AMA
17 on billboard advertising and taxi cab advertising, in
18 regards to how visible the Surgeon General's warning is
19 in those ads.
20 I wrote an editorial in the American Journal
21 of Public Health on advertising, and the question:
22 Does it just get people to switch brands or does it

23 actually increase cigarette consumption?
24 I oversaw production of the 1989 Surgeon
25 General's Report and Chapter 7 of that report had a

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1 huge section on cigarette advertising.

2 I drafted an article on cigarette advertising
3 that was published in the CDC's morbidity and mortality
4 weekly report.

5 I guess the last thing that comes to mind,
6 but obviously there's a lot more listed in my CV, is an
7 expert report that I prepared on cigarette advertising
8 for the city of Chicago, that was used in another court
9 case, that was 25 or so pages long, 65 references which
10 represented a review of all of the scientific
11 literature on the effects of cigarette advertising.

12 Q. Although you do not have a degree
13 specifically in marketing or advertising, by virtue of
14 all this research, by virtue of all this writing that
15 you've done, and reading that you've done on the
16 subject, do you consider yourself to be an expert in
17 the field of tobacco advertising?

18 A. I do. I've used a lot of my epidemiologic
19 background in the research I've done in advertising.
20 So, in some cases it's more helpful to actually be an
21 epidemiologist doing this research than to be, say, a
22 marketing professor, because you can bring different
23 tools of the trade, so to speak, in studying
24 advertising. And looking at what's happening in the
25 environment is all part of what we do in epidemiology,

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1 to understand why people have certain behaviors and why
2 they get diseases.

3 Q. Okay. But from the standpoint of the concept
4 of research on advertising, you know, people think:
5 Okay, you see an advertisement in a magazine or a
6 newspaper, you look at it. And beyond that, what kind
7 of research would you be talking about, that you've
8 done from an epidemiological standpoint, as it relates
9 to tobacco advertising?

10 A. Right. Well, there are a lot of different
11 kinds of studies that can be done. You can do
12 focus-group-type interviews with people and ask them to
13 review an ad and tell you what they think about it.

14 You can do what's called an eye-tracking
15 study and put a device on people's heads that actually
16 shows what part of the ad that they're looking at, how
17 much time is spent on the Virginia Slims model versus
18 the slogan "You've come a long way, baby", versus the
19 Surgeon General's warning in the corner. So, where do
20 their eyes go?

21 You can ask people which ads do they remember
22 seeing in the last month or the last year. And what
23 were those ads, and what did they say? What we would
24 call recall studies. Do they have a favorite ad? Do
25 they have a favorite cigarette brand? And do they know

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1 what ads have been published for that brand?

2 You can ask them all these questions. And
3 then for kids, for example, you can correlate their
4 answers with whether they become a smoker.

5 Studies have shown, for example, that kids
6 whose have favorite ads, who remember characters in
7 ads, Marlboro Man, Joe Camel and the like, but kids who

8 identify with ads, have seen the ads are more likely to
9 become smokers as they move through adolescence. So
10 those are the kind of research that can be done.

11 Q. You've actually done some of this and have
12 been involved in some of this?

13 A. Some of this, but there's much more research
14 that's been done by others than what I've done. So
15 what I've mainly tried to do is summarize the
16 literature in the writings. This I've done.

17 Q. But in order to summarize the literature,
18 you've got to read all the literature on the subject?

19 A. Correct.

20 Q. Has cigarette advertising in magazines
21 increased since the signing of the Master Settlement
22 Agreement?

23 MR. UPSHAW: Objection, Your Honor. Same
24 thing. No foundation for this opinion.

25 THE COURT: You'd have to lay a predicate for

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1 the question.

2 BY MR. ROSENBLATT:

3 Q. Have you studied or made a comparison between
4 the amount of magazine advertising that existed before
5 the signing of the Master Settlement Agreement in 1998
6 to make a determination as to whether magazine
7 advertising for cigarettes has increased or decreased
8 after the signing of the MSA?

9 A. I haven't done my own study, but I've read a
10 study that did exactly that.

11 Q. Tell me what the study was and what the
12 findings were.

13 A. The study was done by the Massachusetts
14 Department of Health, along with another organization
15 referred to as ABT, A-B-T. And they looked at the
16 number of cigarette ads in magazines for the three
17 quarters before the Master Settlement Agreement
18 compared to number of cigarette ads in the magazines in
19 the three quarters after the Master Settlement
20 Agreement.

21 They focused on magazines with a substantial
22 youth readership, a substantial teenage readership.
23 And they found that in those magazines that had the
24 largest teenage readership, like Sports Illustrated and
25 Rolling Stone, and some of those kinds of magazines,

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1 that cigarette advertising has gone up considerably
2 from before the MSA to after the MSA.

3 Q. Did you have occasion, when your deposition
4 was taken most recently, a few days ago, to actually
5 have some magazines at the deposition with you when you
6 were asked questions about them?

7 A. Yes.

8 Q. And these are some magazines that you tabbed
9 on your own in order to put yourself -- to tell them on
10 the deposition what you intended to discuss with the
11 jury?

12 A. I gave them photocopies of all the ads and
13 the covers of the magazines at the deposition. I
14 didn't bring the actual magazines with me. But I did
15 put those tabs in there to mark the same ads that I
16 gave the defense counsel copies of at my deposition.

17 MR. UPSHAW: Can we have a sidebar, please?
18 (Proceedings were had at sidebar)

19 BY MR. ROSENBLATT:
20 Q. Dr. Davis, when you selected these magazines,
21 did you have any input from me or did you do this on
22 your own?
23 A. I did it on my own.
24 Q. So, magazine by magazine, tell the jury what
25 you've tabbed. And as you get to an ad, I think if you

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1 came down and just held it up and showed it to the jury
2 as to what you're talking about --
3 MR. UPSHAW: Your Honor, I'm going to object,
4 I'd like to see it before it's shown to the jury, if I
5 possibly could.
6 THE COURT: Let's come over sidebar. Bring
7 the bunch.
8 THE WITNESS: I gave copies to them already.
9 THE COURT: I'll tell you what we'll do,
10 let's take a short recess.
11 (The jurors exited the courtroom.)
12 MR. ROSENBLATT: I'll just hand them.
13 THE COURT: They had an opportunity to look
14 at this stuff at the deposition because it was
15 presented at that time, as far as the inserts are
16 concerned. And they can look at the magazine from
17 which the inserts were made.
18 MR. ROSENBLATT: Yeah, I mean, they've seen
19 all of this, but copies.
20 Don't take out the tabs.
21 (A brief recess was taken.)
22 THE COURT: Okay, let's proceed. Bring the
23 jury out, please.
24 THE BAILIFF: Jury entering the courtroom.
25 (The jurors entered the courtroom.)

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1 THE COURT: All right, let's proceed.
2 BY MR. ROSENBLATT:
3 Q. Okay, Dr. Davis, the magazines that you
4 selected, why don't you come down and explain, show the
5 ad, and then explain from your standpoint the
6 significance of the ad, whether it, in your opinion,
7 has any youth appeal.
8 A. Well, this is Sports Illustrated. And
9 starting with Sports Illustrated, I think it's
10 important to mention that a lot of kids read Sports
11 Illustrated. This is one of the magazines that has the
12 largest number of teenage readers.
13 In fact, I think it's somewhere around five
14 million teenagers are reading this magazine.
15 This is an ad for Marlboro, Marlboro Milds, a
16 new menthol. It doesn't have the typical sort of
17 Marlboro Man cowboy imagery that you ordinarily see.
18 Menthol cigarettes are used much more
19 commonly by African-American men and women. And about
20 three-fourths of African-Americans use menthol
21 cigarette. I think it's only about one-fourth of
22 non-African-Americans would use nonmenthol.
23 This is, no doubt, an effort by Philip Morris
24 to increase Marlboro smoking among African-Americans,
25 that would be a major, a major effort coming out of

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1 this advertising.
2 That's an ad for Salem cigarettes. And it
3 looks like people are in a bar or a disco. The

4 phraseology is plugged in, "Step inside." To me it
5 suggests that if you smoke this cigarette, you can be
6 part of this party atmosphere.
7 Q. Cambridge, is that a Philip Morris brand?
8 A. I think it is.
9 It shows a man in an inner tube floating on a
10 lake, obviously a very calm, serene sort of image. And
11 the slogan is, or the text at the bottom is: "Relax,
12 Cambridge only tastes expensive."
13 So I think the point here is that smoking can
14 give you a calming feeling. If you have stress in your
15 daily life, smoke that cigarette and it will solve your
16 problems.
17 Q. Newport, which is a Lorillard brand?
18 A. That's right. "Newport pleasure, fired up."
19 Showing some pretty young looking people. They can
20 certainly be in their early 20s if you look at them, or
21 even younger. They're on these personalized
22 watercrafts or jet skis. And it's all about pleasure,
23 sports, fitness.
24 And I think it's designed to draw people away
25 from the health warning and the idea that these things

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1 are harmful to health, because, after all, these people
2 in the ads are quite healthy and active and having a
3 great time.
4 Q. Now, this is a magazine called Hot Bike.
5 A. This is a Camel ad, RJ Reynolds. "Pleasure
6 to burn" is the title. It has a woman, motorcycle, so
7 it obviously matches the magazine that it's in.
8 She's having a hot time on this motorcycle,
9 obviously. I think it's an example of where even
10 though --
11 MR. JOHNSON: Objection, Your Honor, to the
12 witness' interpretation of what he thinks.
13 THE COURT: Overruled.
14 A. I think it's an example of how Camel can have
15 advertising with young looking models that can be very
16 captivating young people, can associate smoking with
17 fun and health and safety, having a good time, even
18 though they don't use Joe Camel anymore.
19 I don't think RJ Reynolds has lost a beat
20 with its Camel advertising since it retired Joe Camel a
21 few years ago. That's a very powerful ad.
22 Q. Now, you interpret this -- is this a real
23 model or is this a drawing of a woman?
24 A. It's a drawing. I mean, it looks fairly
25 realistic, but it's a drawing.

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1 Q. Oh, I didn't understand why this was tabbed.
2 That's merchandise?
3 A. There's a little insert here for Camel,
4 "Pleasure to Burn, Roadhouse Tour." And it says, Route
5 3. Where's the beach? Next to the lobster pound. See
6 you there." And brought to you by Camel Lights. So
7 it's some sort of promotional activity, involving this
8 particular beach.
9 Q. And then you selected a magazine called Guns
10 and Ammo. And you've tabbed the back cover, "Camel,
11 Pleasure to burn". But obviously this is a male.
12 A. Right. This is kind of a male counterpart to
13 the other ad that we already saw. Again, a very macho,
14 virile, tough guy kind of image here. Probably as

15 effective as, if not more effective than, Joe Camel
16 with the pack in his T-shirt sleeve, hair style. And
17 on a prominent location in the magazine.
18 It's important to point out that the back
19 page of a magazine is probably the choice location.
20 The main locations for ads to get the maximum
21 readership or visibility is on the back cover or on the
22 inside covers, such as here or here (indicating). The
23 companies pay premium prices for those locations, so
24 not only do we have a powerful ad, but it's in a
25 powerful location.

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1 Q. Magazine called Stuff for Men. That's
2 actually the title, Stuff for Men: And you've got the
3 classic Marlboro ad, two pages?

4 A. That's right. This is the more traditional
5 Marlboro advertising with the cowboy, cowboy hat,
6 cowboy man presumably.

7 Q. Now, Parliament is a Philip Morris brand.
8 And here's a two-page Parliament ad for menthols.

9 A. Right. This Parliament ad shows a scene at
10 the banana bungalow, looks like a -- it's a pool-side
11 facility. Bungalow, I presume, is a place where
12 entertainment is going on. I presume eating, maybe
13 it's kind of a bar atmosphere.

14 You've got people in motorcycles in the
15 corner. Looks very much like maybe a Miami scene. And
16 I think the implication here is that, again, smoking is
17 associated with having fun, being in popular facilities
18 like this one.

19 Q. People Magazine, that everyone is familiar
20 with.

21 This is May 15, 2000. And the back cover --

22 A. People is another one of those magazines with
23 a number of teenage age readers. I think it's a little
24 over two million teenagers read People Magazine. Back
25 cover, again, choice location for an ad. It's the

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1 conventional sort of Marlboro advertising with the
2 cowboy.

3 Q. Again, the Camel "Pleasure to burn" ad?

4 A. Right, the same ad with the male model.
5 Obviously, that can be appealing to boys who want to
6 look like or who aspire to be like this guy, or it can
7 appeal to girls or women who would like to be with a
8 guy like that.

9 Q. A magazine called Latina?

10 A. That's right, I think this is an example of
11 the cigarette companies targeting minorities,
12 advertising in minority publications.

13 Q. And on the inside front cover there's a
14 Virginia --

15 A. Two-page. If you open it.

16 Q. That's right, two --

17 A. Two pages, prime location, inside front cover
18 in this magazine called Latina. And it's for Virginia
19 Slims. The slogan under Virginia Slims is "Busca tu
20 Verdad," "Look for your truth."

21 My Spanish is a little rusty, so I'm sticking
22 my neck out by trying to read the rest of it. But I'll
23 try and translate.

24 "Tengola capacidad," "I have the capacity" --

25 Q. Very rusty.

1 A. I don't know if I should try and translate it
2 or not or ask someone else. I think it's: I have the
3 ability to say everything without saying a word.

4 Q. Or something like that?

5 A. Her appearance speaks volumes. I think you
6 don't have to say a word when you have an ad like this,
7 you just smoke Virginia Slims, and you can be like her.

8 Q. A magazine called Black Men.

9 A. These are all, by the way, from May 2000. I
10 just picked these up in the store a couple of weeks
11 ago. And this one is obviously like Latina, which
12 targets Hispanic females, this is targeting black men,
13 primarily. And again, a choice location. The back
14 cover is an ad for Kool showing an African-American
15 woman, very young looking. She could easily be in her
16 early 20s.

17 And the phraseology here is "B Kool," with
18 "Be" being just the letter B, capital B. I think an
19 example of having fun with words and letters and
20 symbols, and using that to capture people's attention.
21 And also to act like you're in. You can speak the
22 language of that population, "B Kool."

23 Q. Glamour we went through yesterday. I think
24 there was one or two ads.

25 A. Again, I think more than two million

1 teenagers read Glamour magazine. Another one with a
2 very large teenage readership.

3 Q. Now, this was a magazine you didn't bring,
4 it's called In Style, from April 2000, a magazine
5 obviously designed to appeal to whom?

6 A. Well, people who want to be in style, who
7 want to be stylish. Perhaps more women than men, I
8 would imagine.

9 Q. And just -- you may not have seen this
10 before, but look through here, the Marlboro stuff. And
11 tell the jury what that is.

12 This is an ad for Marlboro. It's a
13 multi-page, fold-out ad. The front face of it says
14 "Cowboy's Place. Well, come on in," it says at the
15 bottom here. And it looks like kind of a bar
16 atmosphere. Come on in and party down would be how I
17 would interpret it. Then you open it up and you can
18 see all the things that are supposedly in Cowboy's
19 Place or Marlboro Country, including Texas style
20 dancing and Sloppy Joes and cacti and playing pool and
21 some radio action. Some sort of promotional kind of
22 sweepstakes thing is what's going on here. And more of
23 the same on the other pages.

24 Q. Okay, why don't you have a seat.

25 Dr. Davis, have you had occasion to review

1 the cigarette company Web sites?

2 A. Yes.

3 Q. And when have you done that?

4 A. Well, I certainly looked at the Philip Morris
5 Web site when it announced with great fanfare that it
6 was making all these so-called disclosures on it, I
7 think back in October of last year. And I think, over
8 the intervening months between then and now, I've had
9 occasion from time to time to look at the Philip Morris
10 site and the other company sites. But I very carefully

11 looked at all of them in the last four or five days in
12 anticipation of being asked about them at trial.
13 Q. Now, the Philip Morris Web site contains this
14 statement -- I think it was shown to the jury yesterday
15 -- and I'm quoting: "There is an overwhelming medical
16 and scientific consensus that cigarette smoking causes
17 lung cancer, heart disease, emphysema and other serious
18 diseases in smokers."

19 Dr. Davis, how long has there been a medical
20 and scientific consensus about that?

21 A. Since at least the early 1960s. It was in
22 1962 when the first important report on smoking and
23 health came out.

24 The British -- the Royal College of
25 Physicians Report in 1962. And then, of course,

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1 followed by the 1964 Surgeon General's Report.

2 And those laid out clearly that the
3 scientific literature shows that smoking was a cause of
4 lung cancer in men and probably in women. And then
5 over subsequent years, that consensus extended to heart
6 disease and emphysema and all the other diseases we've
7 been talking about.

8 So certainly in the 1960s for lung cancer,
9 and no later than the 1970s for all the other
10 conditions we've been talking about.

11 So that's 25 to 35 years.

12 Q. And Philip Morris got around to acknowledging
13 this consensus in October of 1999?

14 A. Correct.

15 Q. Does Philip Morris, anywhere on its Web site,
16 say that it agrees with that consensus?

17 A. No. Not that I could see.

18 Q. What does Philip Morris say on its Web site
19 about the issue of secondhand smoke?

20 MR. WEBB: Your Honor, I'm going to object to
21 secondhand smoke. Could we be heard on this?

22 THE COURT: Well, it really wasn't part of
23 this case. You want to talk about it?

24 MR. ROSENBLATT: Yes.

25 (Proceedings were had at sidebar)

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1 BY MR. ROSENBLATT:

2 Q. Dr. Davis, on the Philip Morris Web site,
3 they talk about how they don't want kids to smoke.
4 What's the number one brand smoked by kids in this
5 country?

6 A. Marlboro. It's smoked by about half of the
7 kids who smoke. They smoke Marlboro.

8 Q. Do you think these ads have anything to do
9 with that?

10 MR. WEBB: Objection, Your Honor.

11 THE COURT: Overruled.

12 BY MR. ROSENBLATT:

13 Q. Do you think these ads have anything to do
14 with why 50 percent of kids just happen to choose
15 Marlboro out of all the hundreds of brands out there?

16 A. Absolutely.

17 Q. Have the tobacco companies changed their
18 behavior one iota when they say and insist that all
19 these advertisements, that you've gone over with the
20 jury this morning and that you've shown them, are
21 designed only to get switchers and never to get

22 nonsmokers to start smoking?
23 MR. UPSHAW: Your Honor, I would object. Can
24 he be specific as to what companies?
25 MR. ROSENBLATT: All of them, all of the

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1 companies.
2 THE COURT: Overruled.
3 A. I believe those ads play a powerful role in
4 encouraging kids to take up smoking, and that's just
5 not my own feeling, which I think most people, their
6 common sense would tell them that it has to be the
7 case. It's actually shown by the scientific evidence.
8 Q. Dr. Davis, on its Web site, Philip Morris
9 states, and I'm quoting: "We support retail education
10 and training programs that restrict youth access to
11 cigarettes and encourage responsible state youth access
12 legislation and enforcement of existing laws."
13 Now, they say they want responsible state
14 youth access legislation, not effective youth access
15 legislation. Do you think they want effective youth
16 access legislation?
17 A. No.
18 MR. WEBB: Objection. Lack of foundation,
19 Your Honor.
20 THE COURT: Based upon his survey of this
21 information, whatever it may be, I'll allow it.
22 BY MR. ROSENBLATT:
23 Q. Based upon your entire background, your
24 survey of this information?
25 A. Right. Well, I've worked on Tobacco control

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1 issues not only at the national level, but in a half
2 dozen states, as I've moved from Illinois to Georgia to
3 Maryland to Michigan.
4 Plus, I've tracked what's happening in all
5 the different states in my roles as head of the Office
6 on Smoking and Health and editor of an international
7 journal called Tobacco Control. And everything that
8 I've seen and heard and read tells me that the
9 cigarette companies do not want effective youth access
10 legislation, because they oppose --
11 MR. WEBB: Your Honor, Your Honor, Your
12 Honor --
13 THE COURT: Overruled. I understand what
14 your objection is.
15 Go ahead.
16 Overruled.
17 A. Because they oppose the one strategy that
18 would be most effective.
19 BY MR. ROSENBLATT:
20 Q. Which is what?
21 A. Which is to license tobacco retailers.
22 Licensing tobacco retailers is the most effective
23 strategy to deal with the youth access problem.
24 And I'd be happy to explain why I have
25 that --

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1 Q. Yes. Why do you have that opinion?
2 MR. WEBB: Your Honor, I object for the
3 reasons we've talked about earlier.
4 THE COURT: He's talking now about why he
5 thinks it's something to consider.
6 A. Licensing of tobacco retailer was recommended

7 when I was at the Office of Smoking and Health, by the
8 department where I worked, by the Department of Health
9 and Human Services. It was essentially a
10 recommendation from the Bush administration to the
11 whole country. It was endorsed by the attorneys
12 general of the states.

13 And they recommended that we license tobacco
14 retailers, just like we license retailers who sell
15 alcohol. And there are two main reasons why we ought
16 to do this. One is it allows us to enforce this
17 legislation, because if a retailer is found to be
18 selling tobacco repeatedly to minors, in violation of
19 the law, they can have their license to sell tobacco
20 suspended or revoked.

21 You take away their license for a week or a
22 month or six months and say: You cannot sell
23 cigarettes, because you keep selling to minors. Then
24 they feel it, that's putting teeth in the law; whereas
25 most of the state laws that we have now, they levy a

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1 fine of \$50 or \$100.

2 Now, a store that is selling tobacco
3 repeatedly to minors is making a lot more money from
4 the minors buying the cigarettes than the \$50 fine they
5 might have to pay once a year or once every two years.

6 So, the existing laws, for the most part, are
7 totally ineffective. But a licensure law would be
8 effective, because, again, you take away their license
9 for a month or six months, tell them, "You cannot sell
10 tobacco to anybody," they feel it in their pocketbook.

11 Q. And the tobacco companies have always opposed
12 such law?

13 A. They have always opposed licensure
14 legislation.

15 And the second reason why licensure is
16 effective, besides putting teeth into the enforcement,
17 is it allows you to raise revenue through license fees,
18 so you can hire inspectors to do sting operations.

19 Having laws on the books do not do any good
20 if you are never visiting the stores and conducting a
21 compliance check. A lot of these laws are on the
22 books, and nobody does any compliance checks.

23 Why? Well, a lot of state agencies don't
24 have the money, they can't hire new people. But if you
25 do licensure and you require a store to pay \$300 for

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1 its yearly license to sell tobacco, which is minuscule,
2 that's \$5 a day, if you require that, then you have a
3 pot of money that you can use to hire inspectors to
4 visit the stores and to do compliance checks two or
5 three times a year.

6 And then, if you find repeated violations,
7 then you suspend their license. And if you keep
8 suspending their license and they still don't learn,
9 then you revoke their license. And that's how you deal
10 with this issue. And when we've raised this in state
11 after state, and when the federal government recommends
12 it, as the Department of Health and Human Services did,
13 they recommended a \$300 license fee.

14 This is the Bush administration. Typically,
15 the Bush administration did not like to do anything
16 that might hurt small business, but they recommended,
17 because smoking is a big enough problem, and that the

18 sale to kids goes on over and over and over again, they
19 recommended a \$300 license fee for the right to sell
20 this dangerous, addicting product. And the tobacco
21 industry has opposed it repeatedly.
22 MR. UPSHAW: Your Honor --
23 MR. WEBB: Objection.
24 THE COURT: Overruled. I think we've talked
25 about it enough. Let's move on to something else.

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1 BY MR. ROSENBLATT:
2 Q. I just want to be clear of one thing with
3 respect to the Web sites. Your deposition was taken
4 several times. The most recent was May 19th, Friday, a
5 few days ago?
6 A. This past Friday.
7 Q. Now, I just want to be clear. At that time
8 when your deposition was taken, had you looked at the
9 Web sites -- I know you looked at the Web site of
10 Philip Morris, but had you looked at the Web site of
11 Reynolds? Had you looked at the Web site of Brown &
12 Williamson?
13 A. I think my comment was that I had looked at
14 all these various Web sites from time to time.
15 Couldn't remember the specifics in order to cite, in
16 order to cite specific passages. But that's why I did
17 review them carefully since my deposition on Friday.
18 MR. ROSENBLATT: I'll have to look at the
19 language during the lunch break.
20 THE COURT: All right.
21 BY MR. ROSENBLATT:
22 Q. Now, Dr. Davis, you at one time prepared a
23 23-page report on cigarette advertising for the city of
24 Chicago, correct?
25 A. Right.

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1 Q. And when did you do that?
2 A. I don't have the date, but I think it was
3 about a year, year and a half ago.
4 Q. What did that report do?
5 A. It looked at all of the scientific evidence
6 on cigarette advertising; what its effects on kids are;
7 what the evidence is that bans on cigarette advertising
8 in other countries work; what is the evidence that
9 cigarette advertising cost more than just get people to
10 switch from one brand to another, but actually
11 increases the total amount of cigarette sales and
12 cigarette smoking.
13 I focused quite a bit on billboards because
14 that was the main issue that Chicago, the city of
15 Chicago was dealing with, that they asked me to
16 address.
17 Also, it looked at what the Surgeon General
18 has said about cigarette advertising in the various
19 Surgeon General's Reports.
20 Q. Well, okay. Now under the Master Settlement
21 Agreement billboards are out?
22 A. That's correct.
23 Q. There's no more advertising on billboards.
24 In your opinion, has that ban, that agreed-to
25 ban on advertising on billboards, had a negative impact

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1 on the strategies of the tobacco companies to advertise
2 and promote their products?

3 MR. WEBB: Your Honor, objection. Lack of
4 foundation.
5 THE COURT: I think he said he looked at this
6 sort of thing. I guess you'll have to ask the
7 question.
8 MR. ROSENBLATT: I'm sorry, Judge.
9 THE COURT: What does he base his opinion
10 regarding billboards on?
11 MR. ROSENBLATT: Okay. Although, I think in
12 the previous question --
13 Q. On what do you base your opinion, whatever
14 your answer is going to be, on whether the absence of
15 billboard advertising has any negative impact on the
16 tobacco companies' ability to advertise and promote
17 their products through other mediums?
18 A. Well, there are two lines of evidence, I
19 guess. One is the report I referred to earlier, from
20 the Massachusetts Department of Health on advertising
21 in magazines from before the MSA to after the MSA; but
22 also, it's a longstanding observation of what's
23 happened both in the United States and abroad when
24 certain forms of advertising are curtailed.
25 In other words, there's a long history on

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1 exactly what happens when you restrict only one or two
2 or three forms of advertising but allow many other
3 forms of advertising to continue.
4 Q. What does that show?
5 A. That shows that, invariably, what we call
6 partial bans on advertising are weak and either don't
7 work well or don't work at all, for a number of
8 reasons. One, advertising can go up in those other
9 media where advertising is still allowed. So, you
10 close off billboards, and then advertising goes up in
11 magazines, as we talked about before. So that's one
12 reason.
13 Another is that, within a particular medium,
14 besides shifting, you can simply have expenditures
15 going up. Point of sale, for example. A lot of
16 advertising at the point of sale for cigarettes,
17 whether it's a Marlboro clock or a Winston change dish
18 or various other stickers and fliers where you pay your
19 money. A lot of point of sale advertising. Another
20 opportunity to shift your advertising expenditures.
21 And then a third is just finding loopholes.
22 When you don't close off all tobacco advertising and
23 promotion, there are loopholes involved, and the
24 tobacco companies invariably, in this country and
25 abroad, have found loopholes. Where there's a

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1 loophole, they find it, and that's where they send
2 their marketing dollars.
3 Q. When you talk about the point of sale
4 advertising, you mean this is where cigarettes can
5 actually be purchased?
6 A. Correct.
7 Q. You go into a store and you see an
8 advertisement?
9 A. Right. Actually, traditional sort of signs,
10 as well as these clocks and change dishes and garbage
11 cans and various other paraphernalia that have the
12 cigarette brands on them.
13 Q. The Chicago report that we talked about --

14 how many articles and reports did you cite in your
15 report?
16 A. I think it was 60, 65, something like that.
17 Q. Did the Master Settlement Agreement ban
18 tobacco sponsorship of NASCAR auto racing?
19 A. No.
20 Q. Is that important?
21 A. Yes.
22 Q. Why? In what sense?
23 A. Well, a couple of reasons, first of all, a
24 lot of kids go to NASCAR races.
25 I think a second point is that these events

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1 get on television. And if it's a Marlboro race, during
2 a 60-minute or 90-minute broadcast on T.V., you may
3 have the name Marlboro repeated by the announcer over
4 and over and over again.

5 And in past years, studies have been done
6 that also look at the signage at these races. And when
7 the broadcast shows the cars going around the track
8 over and over again, sometimes you see the "Marlboro"
9 plastered all over the car. Sometimes you see Marlboro
10 signs around the track.

11 And one study, in the New England Journal of
12 Medicine a number of years ago, found thousands of
13 mentions or shots of "Marlboro" either being said or
14 being shown on that television program over a 90-minute
15 period of time, which directly violates at least the
16 spirit if not the letter of the law that says you can't
17 advertise cigarettes on T.V.

18 So that's why cigarette sponsorship of events
19 like NASCAR, that get on television, that's another
20 reason why, why we have a problem with cigarette
21 smoking and why the Master Settlement Agreement did not
22 go anywhere near as far as it should have.

23 Q. Did the Master Settlement Agreement -- and I
24 think the answer to this is very obvious from the ads
25 you've shown to the jury -- but did the Master

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1 Settlement Agreement ban the use of human models in
2 cigarette ads?

3 A. No. No. The 1997 settlement that the
4 cigarette companies signed with the attorneys general,
5 that would have banned human models in cigarette ads.
6 And the companies all signed that.

7 They were willing, in 1997, to remove human
8 models from their ads, including the Marlboro Man. But
9 because Congress didn't act on it, that never happened.
10 And so I think it might be Liggett now not having human
11 models in its ads. But, obviously, all the other
12 companies do.

13 Q. Why is that important, whether there's human
14 models or not human models in the ads?

15 A. It's important because even without a cartoon
16 character like Joe Camel, who is gone, or Willy the
17 Penguin, who was a cartoon character used for Kool
18 cigarettes, even without the cartoon characters, you
19 have these very alluring and seductive and attractive
20 humans, like the Marlboro Man and that Virginia Slims
21 lady, and those frolicking young-looking people in the
22 Newport ads, you have all of them just speaking volumes
23 just by the way they look, and what they're doing, and
24 how they're dressed, and that they're going into bars

1 All that just speaks volumes about what they
2 can expect if they smoke cigarettes. That's why it's
3 important.

4 Q. Well, for example, you were in the courtroom
5 yesterday when they showed on the screen the three
6 Philip Morris ads with the kids saying, in effect:
7 Don't smoke.

8 Some kids are on a bus. There were other
9 scenes.

10 And when you compare those kinds of ads to
11 the ads that you've been discussing today and
12 displaying to the jury, what is the relative impact of
13 them, in your opinion, on kids?

14 MR. WEBB: Your Honor, I object. Complete
15 speculation. No foundation.

16 THE COURT: Overruled.

17 A. Well, I've looked at a lot of antitobacco ads
18 in my time.

19 We produced them at the Office on Smoking and
20 Health, when I was director. We collected them from
21 all the states that produced them at that time.

22 We produced them in Michigan, when I was the
23 medical director in the State Health Department in
24 Michigan.

25 I've seen a lot of those ads. And I've seen

1 the magazine ads, obviously. And the Philip Morris
2 T.V. spots don't hold a candle to what Madison Avenue
3 is capable of doing, and what they have done for the
4 federal government and state government, and for
5 various other organizations, like the American Cancer
6 Society.

7 I don't think they're effective at all. They
8 don't give kids solid enough, a powerful enough reason
9 why not to smoke. They don't grab you emotionally like
10 some of the ads in Massachusetts, for example, where
11 they show a former tobacco company lobbyist, who was
12 dying of lung cancer, who said: Look, I used to work
13 for those guys. I smoked. I got lung cancer. Look at
14 me. Don't smoke. Don't do what I did. Don't make the
15 mistake I made.

16 Or a lady who was the former Lucky Strike
17 model, who had her voice box removed, and she was on a
18 Lucky Strike ad, Janet Sackman. And she spoke with an
19 electrical device put up against her throat. That was
20 the only way she could speak. And in a very croaky
21 voice, she said: You know, I was a Lucky Strike lady,
22 and look what it did to me. It gave me cancer of the
23 voice box. They had to take it out. I can't talk now,
24 except without this device. Don't do what I did.
25 Don't listen to the cigarette companies. Don't smoke.

1 Those kinds of ads are powerful. They're
2 gripping, they're emotional. They get kids to stop and
3 listen. And none of that is in the Philip Morris
4 advertising.

5 Q. Well, what about the argument that the
6 tobacco companies frequently make: It's really not
7 good to be too direct and too powerful and too preachy.
8 And even though kids see an ad like that, they can't
9 relate to a 50-year-old when they're 14 or 15? And

10 they say that's why they use those kinds of ads?
11 A. There is substantial evidence that has shown
12 that the ads that I just described, the powerful,
13 gripping, emotional ads, that they work. There's
14 evidence of that in Massachusetts, where they've had
15 huge declines in smoking. There's evidence of that
16 from Australia, where they show --
17 I'll give you an example of an ad they did in
18 Australia. They have the aorta, which is the main
19 artery in your body. It's thicker than your thumb.
20 And they showed cholesterol being squeezed out of an
21 aorta from somebody who had cholesterol hardening of
22 the arteries from smoking. And the point of the ad
23 was: This is what smoking does to you.
24 They squeezed, they took an autopsy specimen
25 of an aorta, and they squeezed out the cholesterol from

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1 it and they said: This is what happens to you if you
2 smoke.
3 Those are effective. It's just not me saying
4 it based on my own personal reaction, it's actual
5 scientific evidence showing that.
6 Now, that's not the only kind of message we
7 ought to be putting out to kids, because some kids do
8 say to themselves, you know: I'm not going to get
9 that, I don't care what's going to happen to me when
10 I'm 50. And a lot of them think they're invulnerable.
11 So, yeah, you don't want to have just the
12 health scare in your messages, you want to have some
13 other things, too, but it's got to give them a reason
14 to quit.
15 One of the ads we did in Michigan showed kids
16 giggling, talking, happy-go-lucky. Then at the end of
17 the ad they talk about not smoking, and they stick out
18 their tongue, and it's filled with cigarette ashes and
19 butts. That gets at the cosmetic effect of smoking,
20 gives you bad breath, yellow teeth, smelly clothes, you
21 have a lot harder time attracting the opposite sex,
22 that's a tangible reason not to smoke. It's not a
23 health scare, it's a cosmetic scare. It gives you a
24 solid reason why you shouldn't smoke. And I did not
25 see that kind of thing in the Philip Morris ads.

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1 Q. Are the billions of dollars which are
2 allocated to the states by the Master Settlement
3 Agreement, in your judgment, all that helpful for
4 reducing smoking?
5 A. No. They could be if the states were putting
6 those dollars into youth prevention programs. But very
7 few of the states are putting substantial dollars into
8 those programs.
9 The CDC has estimated what states ought to be
10 spending to have an effective comprehensive tobacco
11 control program. And the number of states that have
12 allocated enough settlement dollars or other dollars to
13 tobacco control is very low. I don't know, off the top
14 of my head, what it is. It may be five, it may be ten.
15 But it's nowhere near a majority of the states.
16 And as a result, the monies that the MSA
17 contribute to the states has not really helped us a
18 whole lot for public health purposes and for,
19 especially, reducing smoking.
20 Q. Now, in the Tobacco Control literature, there

21 are references made to generic packaging or plain
22 packaging. What is that?
23 A. Generic packaging of cigarettes would be like
24 generic packaging of other products, whether it's soap
25 or dish cleaner or cereal, where you have a very plain

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1 package which typically would have no color on it, no
2 pictures, no imagery. It would just have the name of
3 the product and perhaps anything else that's required,
4 like ingredients.

5 Q. Now, has there been research to see what the
6 effect on kids would be of generic packaging of
7 cigarettes, rather than the current manner in which
8 cigarettes are packaged in this country?

9 A. Yes. Researchers in New Zealand and in
10 Canada have done substantial research on the -- what
11 the effect would be of generic packaging for
12 cigarettes, what the effect would be, in particular, on
13 kids.

14 Q. I'm going to show you a pamphlet on Virginia
15 Slims, I'm going to show you a pamphlet on Cowboy's
16 Place, and ask you to explain to the jury what these
17 are and what it means, in the context of continuity
18 advertising.

19 A. These are some pamphlets that I picked up at
20 the point of sale in the last week or two. One is for
21 V Wear, Virginia Slims wear, which allows you to return
22 proofs of purchase like bar codes, I think. And if you
23 return so many bar codes, then you can get free or
24 discounted apparel, various products in here, such as
25 clothing and clocks and watches and shower curtains and

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1 mirrors and the like.

2 This other one is an ad at the point of sale,
3 similar to the ad we saw in the magazine for Cowboy's
4 Place, which again is advertising this promotion, this
5 sweepstakes, where if you enter and win, you can
6 experience a trip to the Marlboro ranch and get 100
7 pounds of beef and pool table and jukebox, and that
8 kind of thing.

9 Q. Now, is that -- you know, when we hear the
10 general term "marketing," those kinds of pamphlets, are
11 they within the realm of advertising or within the
12 realm of promotion or a combination?

13 A. Typically, people who track tobacco
14 advertising, such as the Federal Trade Commission,
15 divide up advertising into two categories. One is
16 traditional print advertising, which would include
17 newspapers, magazines, billboards, transit ads,
18 point-of-sale signs.

19 And then we have all sorts of promotions,
20 what they categorize as promotion, which would include
21 sponsorship of sporting events, giving out free
22 samples, coupons, special sort of "Buy one, get one
23 free" deals; the placement of cigarettes in the movies,
24 which the companies don't do any longer but which they
25 used to do to a great degree.

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1 And these sort of things, the V Wear and
2 Marlboro contest and so on, would fall in the category
3 of promotion.

4 Q. Dr. Davis, are you aware that in litigation,
5 right up until the present time, that Philip Morris

6 officially takes the position that it has not been
7 scientifically established whether cigarette smoking
8 causes any disease in human beings?
9 MR. WEBB: Your Honor, I object. Can we be
10 heard on this?
11 THE COURT: Let me read the question again,
12 I'm sorry.
13 MR. WEBB: Your Honor, could we be heard at a
14 sidebar on this, please?
15 THE COURT: All right.
16 (Proceedings were had at sidebar)
17 BY MR. ROSENBLATT:
18 Q. For the moment, Dr. Davis, forget about the
19 specific forum or the context. But are you aware that
20 to this day, Philip Morris, in certain settings, has
21 taken the position that it has not been scientifically
22 established that cigarette smoking causes any disease
23 in human beings?
24 A. Yes.
25 Q. And is that position 100 percent opposed to

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1 the position that they set forth in their Web site?
2 A. Yes.
3 MR. ROSENBLATT: Would it be a good time?
4 THE COURT: For lunch, okay. All right.
5 We'll take our lunch break, folks. I have been advised
6 that Juror No. 12 needs to leave by at least 5:00
7 today. So let's shoot for that. Okay.
8 (The jurors exited the courtroom.)
9 THE COURT: 1:30, folks.
10 All right. You're under the same rules that
11 you're familiar with, not to discuss the case.
12 (Court was adjourned at 12:10 p.m.)
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